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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS,

Petitioner,

vs.

EUGENE M. ZUCKERT,
Secretary of the Air Force, *et al.*,

Respondents.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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I.

Respondents urge that no constitutional issue is raised or presented and that petitioner, who asserted a violation of his Fifth Amendment rights before the Civil Service Commission and in the district court, abandoned that argument in the court of appeals and in this Court (Res. Br., 15-16). This contention is misleading. While it is true that the constitutional issue is not asserted as an independent ground for reversal, we pointed out in the court of appeals[1]

[1] Appellant's Br., p. 2, C.A.D.C., Appeal No. 16,345.

and in this Court[2] that jurisdiction in the district court was based, *inter alia*, on the "Fifth and Sixth Amendments to the Constitution of the United States," and urged the constitutional issue as an aid to statutory construction in our briefs in the courts below.[3]

The construction respondents place on Section 14 of the Veterans Preference Act and the applicable Civil Service Regulations (Res. Br., 18-21, 29-33) raises serious doubts as to their constitutional validity. In *Bailey* v. *Richardson*, 341 U.S. 918 (1951), this Court upheld the denial of confrontation and cross-examination to a non-veteran dismissed from federal employment on loyalty grounds by an evenly divided vote. The constitutional problem inherent in a denial of confrontation and cross-examination to one dismissed from federal employment is hardly less substantial when the ground for dismissal is homosexual conduct. We urge, therefore, that the Court construe the statute and applicable regulations, "if fairly possible, in such a way as to free [them] from [these] not insubstantial constitutional doubts." *Lynch* v. *Overholser*, 369 U.S. 705, 711 (1962); *United States* v. *Rumely*, 345 U.S. 41, 45-47 (1953); *United States* v. *Jin Fuey May*, 241 U.S. 394, 401 (1916).

Rejection of respondents' construction of the statute and applicable regulations is dictated, moreover, by *Greene* v. *McElroy*, 360 U.S. 474 (1959). In that case, this Court considered the importance of confrontation and cross-examination in our jurisprudence and pointed to the "zealous protection" accorded these rights by the Constitution, the Courts and the Congress. *Id.*, at pp. 496-497. It adverted

[2] Pet., 5; Pet. Br., 4.

[3] Appellant's Br., pp. 12, 14-15; Reply Br., pp. 3-4, C.A.D.C., Appeal No. 16,345.

to the classic statement of Professor Wigmore that "no safeguard for testing the value of human statements is comparable to that furnished by cross-examination" (*id.*, at pp. 497-498), and concluded that, in the absence of explicit authorization from either the President or the Congress, "respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Id.*, at pp. 507-508. Here, as distinguished from Section 6 of the Lloyd-LaFollette Act, 37 Stat. 555, 5 U.S.C. §652, there is no explicit congressional rejection of the right of confrontation and cross-examination. In fact, Congress eliminated from Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. §863, the Lloyd-LaFollette provision making cross-examination of witnesses, trial, or a hearing a matter for the discretion of the removing officer, and substituted therefor, an appeal to the Civil Service Commission with the right to make an appearance either personally or by representative. (See Pet. Br., 7-9.) And where explicit rejection of the right of confrontation and cross-examination is absent, this Court will not assume that Congress intended to deny these safeguards to the individuals affected. *Greene* v. *McElroy*, 360 U.S., at 507-508; *Bland* v. *Connally*, 293 F.2d 852, 857-860 (C.A.D.C., 1961); *Davis* v. *Stahr*, 293 F.2d 860, 863-864 (C.A.D.C., 1961).

Respondents seek to avoid the impact of the Air Force's refusal to produce at the hearing the adverse witnesses against petitioner by suggesting that they might have appeared if petitioner had only asked them (Res. Br. 14-15, 28). This argument ignores Air Force Regulation No. 110-5,[4] the military status of the accusing witnesses, and

[4] AFR No. 110-5, 32 C.F.R. §804.404(a) provides: "Where the United States is a party to the litigation in question, no information will be released without the concurrence of the Judge Advocate General, U.S.A.F. * * * or one of [his] representatives.

the fact that two of the witnesses were stationed at the Air Force Academy and petitioner had been barred from entering the Academy grounds (R. 18-19). Neither the Air Force nor the Civil Service Commission suggested during the administrative proceedings that petitioner could secure the appearance of these witnesses merely by asking them to attend. When petitioner officially requested that the Air Force produce them, his request was rejected because "the Air Force Academy saw no need for their attendance" (R. 44) and AFR No. 110-5, 32 C.F.R. §804.401, *et seq.*, precluded their voluntary appearance absent consent from the Air Force.

II.

Respondents to the contrary notwithstanding (Res. Br. 22-23), the contemporaneous administrative construction of the appeal provision of Section 14 of the Veterans Preference Act is evidenced by the Commission's regulations promulgated thereunder (Pet. Br. 8-9), not by an erroneous administrative practice departing therefrom. If the practice and not the regulation is to be accepted as guiding or controlling judicial decision, it must at least be known. Cf. *Sanford's Estate* v. *CIR*, 308 U.S. 39, 50, 52 (1939); *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U.S. 325, 330-331 (1957). Respondents' argument concerning the 1947 reenactment of the Veterans Preference Act (Res. Br. 38-39) expressly confirms this view. By that time, the Civil Service Commission had adopted regulations providing for an

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i.e., a staff judge advocate * * *". The regulation defines "litigation" as including "civil administrative proceedings [before] commissions, boards, or other tribunals" (32 C.F.R. §804.41) and requests for appearance not accompanied by a valid subpoena are treated as "a request for release of information." 32 C.F.R. §804.411(c).

adversary type of administrative hearing at the appeal level (Pet. Br. 8),[5] and it was the statute as interpreted by these regulations, not the unreported administrative practice thereunder, which Congress in 1947 "implicitly accepted and ratified" (Res. Br. 38). Cf. *Cammarano* v. *United States*, 358 U.S. 498, 511 (1959).[6]

The fact that the Veterans Preference Act confers no subpoena power on the Commission (Res. Br. 32-33) is hardly persuasive where the Air Force admitted that the witnesses to petitioner's alleged misconduct were airmen on active duty, subject to its military control, and the only reason it refused to produce them was because it unilaterally concluded that their testimony would not have aided petitioner's case (R. 85). In *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), the Department of Interior had no power to subpoena witnesses. Yet, this Court construed Section 21(c)(4) of Interior Department Order No. 2738 (which gave the employee the right to "cross-examine any witness offered in support of the charges"), as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee upon which the agency relied.

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[5] These regulations, which are substantially the same now as when first issued, provide that the "employee has a right to appear at the hearing on his appeal * * *", that the "agency has a right to participate in such a hearing", and that "[b]oth parties shall have the right to produce witnesses" (5 C.F.R. §22.601); that "[o]pportunity will be afforded for the introduction of evidence (including testimony and statements by the employee * * * and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses" (5 C.F.R. §22.603); and that "testimony at hearings shall be under oath" (5 C.F.R. §22.605).

[6] The Civil Service Commission's interpretation of the applicable regulations first became a matter of public knowledge in 1951 when *Devine* v. *Campbell*, 194 F.2d 876 (C.A.D.C.) certiorari denied, 344 U.S. 826 (1952), was decided.

Moreover, while we agree that the applicable regulations provide broadly for a Commission investigation (Res. Br. 5-6, 19), it should be noted that the statute requires both that the Commission shall investigate and that the employee "shall have the right to make a personal appearance * * * ." 58 Stat. 390, 5 U.S.C. §863. The regulation providing that "[s]tatements of the witnesses shall be by affidavits, when practicable * * * ," 5 C.F.R. §22.401(b), relates to the investigation of employee's appeal by the Commission and not, as respondents contend (Res. Br. 18-19), to the introduction of evidence at the appeal hearing itself. See 5 C.F.R. §22.603. It should also be noted that while a veteran's appeal proceeding before the Commission is denominated as an "appeal", it is normally the first opportunity the employee has for a "hearing" on the charges against him. In this respect, the "appeal" hearing before the Commission is substantially similar to a hearing before an Appeal Division of a regional Industrial Personnel Security Board. See *Greene* v. *McElroy*, 360 U.S. 474, 485-490 (1959).

In *Vitarelli* v. *Seaton*, 359 U.S. 535, 544-545 (1959), this Court construed a regulation substantially similar to 5 C.F.R. §22.603 as requiring the Interior Department to call as witnesses all "non-confidential" informants. Respondents advance no persuasive reason (Res. Br. 25-27) why *Vitarelli* is not controlling here.

Conclusion

By reason of the foregoing, the decision below should be reversed.

Respectfuly submitted,

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